SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 250

CARL BRANDENFELS,
Petitioner

v.

J. EDWARD DAY, Postmaster General, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The Petitioner, Carl Brandenfels, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of the Court of Appeals, dated February 14, 1963, is reported at 316 F.2d 375 (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered February 14, 1963. Timely petition for rehearing was

denied April 2, 1963. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether the Post Office Department in an accusatory administrative proceeding charging the respondent with mail fraud, brought under 39 USC 259 and 732, may dismiss the complaint without prejudice to its renewal, over the respondent's objection, to deprive the respondent of acquittal of the charges made,

(a) When lengthy evidentiary hearings have been held and concluded, and

(b) An Initial Decision has been made against respondent secretly and ex parte by the prosecutor of the charges against him, and

(c) After the respondent has appealed from that Initial Decision, waiving on the record the right to object to the fact that the Hearing Examiner who presided at the hearings did not make the Decision.

2. Is such a dismissal subject to judicial review?

3. The order of dismissal without prejudice, like the Initial Decision, was secretly and improperly made ex parte by the complainant-prosecutor of the charges against the respondent. After entry of the order the respondent filed a petition requesting that it be modified, so as to be with prejudice. An agreement was thereupon entered into between respondent and his adversary the General Counsel with concurrence of the Judicial Officer that the merits of the charges of fraud be fully and fairly determined by the Judicial Officer in considering that petition, an agreed order for such determination being entered on the record. Did that agreement for full and fair determination of the merits constitute an agreement by petitioner to be bound by a sham and fatally defective official determination thereafter made by the Judicial Officer?

STATUTE INVOLVED

The Administrative Procedure Act, printed in App. B infra pp. 33-37.

Statement of the Case[1]

This case grows out of a Post Office Department fraud order proceeding, in which petitioner was charged with fraud in claiming efficacy for his treatment for baldness and excessive falling hair, sold by him through the mails.

Begun in May of 1949, that proceeding was terminated in the Post Office Department in 1960, with no final decision on the merits; the complaint, over petitioner's objection was then dismissed without prejudice to its renewal. JA 10, 24, 27. The ultimate ground for that dismissal, was stated by the departmental Judicial Officer when, in September 1960, he ruled: (JA 57)

> "An agency is virtually unrestricted in its authority to dismiss without prejudice when no final agency decision on the merits has been rendered."

That ruling was the administrative culmination of persistent unsuccessful effort by petitioner to obtain a fair determination of the merits of the charges of fraud, brought against him 11 years earlier.

Extensive evidentiary hearings on the issue of fraud were begun in 1949, and concluded in 1950. JA 10. The presiding Hearing Examiner made no decision, having been separated from the Post Office Department for resistance to unfair pressures to issue fraud orders, placed upon him by the Postal Inspection Service. JA 10, 11.

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[1] References "JA" refer to the Joint Appendix in the court below. Briefs of the parties in the court below, to which reference is also made, have been certified by the clerk of the court below and lodged with the clerk of this Court.

In February of 1954, William O'Brien, Post Office Department attorney, the complainant-prosecutor in the case, secretly and ex parte made an Initial Decision finding petitioner guilty of fraud. JA 11, 12. On petitioner's administrative appeal from that Initial Decision, Mr. O'Brien saw that the merits of the issue of efficacy fairly decided would necessarily be determined in petitioner's favor. JA 15, 16. To deprive petitioner of that vindication, Mr. O'Brien moved the complaint be dismissed without prejudice to its renewal, a motion petitioner opposed. JA 16. In March of 1958, Mr. O'Brien granted his own motion, again secretly and ex parte, by having entered an order dismissing the complaint without prejudice. JA 17, 18.

Petitioner promptly filed a petition to modify the dismissal order, by making it *with* prejudice. JA 19. While that petition was pending, an agreement was reached between both sides, with the concurrence of Judicial Officer Charles Ablard, that a fair hearing on the merits be had. JA 20. This was to be accomplished by review of the record by the Judicial Officer, to determine whether the prayer of the petition should be granted—that is, whether the dismissal should be *with* rather than *without* prejudice. JA 20. An agreed order to that effect was entered in November of 1958. JA 20.

Following presentation of briefs and argument to the Judicial Officer, he issued his Departmental Decision in October of 1959, in which he refused to modify the order of dismissal. JA 20. His Departmental Decision was false, sham and fatally defective in numerous respects. JA 21-24.

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[1] Both the Initial Decision and the Order of Dismissal were signed by a Deputy Postmaster General. In each case that official exercised no independent judgment in affixing his signature to the document prepared and presented to him by the complainant-prosecutor, relying instead upon assurances by Mr. O'Brien that the documents should be signed. JA 11, 12, 17-19.

Petitioner's prompt petition for reconsideration of the Departmental Decision set forth those defects specifically. JA 21-24. The Judicial Officer expressly ruled that the petition for reconsideration "will not be considered." JA 24, 57, 58. At the same time he abandoned all pretense of having fairly reviewed the record to reach his Departmental Decision, instead basing the refusal to dismiss with prejudice on the proposition that "an agency is virtually unrestricted in its authority to dismiss without prejudice when no final agency decision of the merits has been rendered." JA 57.

This Court may accept as a fact the sham character of the Departmental Decision.[1]

Petitioner had expended many tens of thousands of dollars in his defense and found himself exposed to repetition of the same charges involving inevitable duplication of past expense. The charges of fraud against him had caused reputable publishers to refuse his advertising. As a result his income was greatly curtailed and his costs were greatly increased, causing heavy and irreparable injury to his mail order business. JA 12.

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[1] As stated above, the Judicial Officer himself abandoned his Departmental Decision as a basis for allowing the order dismissing without prejudice to stand. The complaint in the District Court set forth the Departmental Decision (JA 41-55) and set forth specifically and in detail those fatal defects (JA 20-24). They included, inter alia, the false finding that petitioner had waived, before the Judicial Officer, his expert scientific evidence which consisted of expert testimony by eminent medical doctors. Specialists in pertinent fields, their testimony was also based on then unprecedented scientific tests of the treatment, in which they had taken part, including a test supervised by a committee of the University of Oregon medical school. In the court below petitioner briefed the merits of the issue of fraud but respondents defaulted, contending basically that there was no case or controversy, and that petitioner had not exhausted his administrative remedies. (Briefs of parties in court below). The court below did not go into the merits of the charges of fraud. (App. A)

After further skirmishing in the Post Office Department, leading nowhere, petitioner in 1960 brought suit in the District Court for the District of Columbia, to review the Post Office Department proceeding through a declaratory judgment, and an injunction restraining Post Office Department officials from renewing the same charges against him. JA 25-28, 6. Jurisdiction of the District Court was based upon 28 USC 1331 and 1339; 5 USC 1001; 28 USC 2201 and 2202; and the provisions of the Fifth and First Amendments to the Constitution relating, respectively, to due process of law and freedom of speech and of the press. JA 6.

While the case was pending there, the Federal Trade Commission, at Post Office Department instigation, began preparing identical charges of misrepresentation of efficacy, to be brought against petitioner before that body. The FTC Commissioners were accordingly made parties by amendment and supplement to the District Court complaint, which alleged that they were planning to and would take action at Post Office Department instigation, duplicating the Post Office Department charges, unless enjoined. JA 72, 73.

Upon motion of the Post Office Department defendants to dismiss the complaint for lack of jurisdiction (due to claimed absence of a case or controversy) the District Court dismissed the complaint with prejudice, sua sponte, as to all defendants. JA 64, 92, 93.

Upon petitioner's appeal, the Court of Appeals affirmed the District Court's action in dismissing the complaint. Its decision was based fundamentally on grounds never advanced nor asserted by petitioner's adversaries, in that Court or elsewhere. (App. A; JA 64-69; Br. of Resp. in Ct. below.)

In its decision the Court of Appeals treated the agreed order, designed to provide a full and fair administrative determination of the merits of the charges of fraud,

as if an agreement by petitioner to be bound by the Departmental Decision to follow, no matter how arbitrary, capricious or sham in character. There was no such agreement in fact; the Court of Appeals seems to have ruled that there was one in legal effect, because the agreed order did not by its terms permit the Judicial Officer to issue a fraud order against petitioner. App. A, pp.

REASONS FOR GRANTING THE WRIT

The decision below in effect nullified and at best treated as ephemeral the right of an agreed party to judicial review of termination of an administrative proceeding which had gone through evidentiary hearings and an Initial Decision. Such procedure is in conflict in principle with views expressed by this Court recently in Wisconsin v. Federal Power Commission —— US —— 10 L.Ed. 2d 357 (1963), in conflict with the decision by the same court in the Minneapolis Gas Company case, 294 F.2d. 212 (1961), and the decision of the Fourth Circuit in Deering Milliken, Inc. v. Johnston 295 F.2d 856 (1961). It is in violation of numerous provisions of the Administrative Procedure Act. That question involved, although not precisely decided by this Court is important to the proper functioning of administrative bodies generally.

The decision that an agreement for a full and fair hearing, shamefully denied prior thereto for years, constitutes an abandonment of the right to judicial review of the sham and mock hearing and determination which followed, is without precedent. It is so contrary to law and reason that it does not even obscure the real decision, which was to deny petitioner the right to review the termination without a decision on the merits.

This case also involves the meaningfulness of this Court's decision in Reilly v. Pinkus 338 US 267 (1949) which limited administrative bodies from censorship of

medical progress through blind adherence to traditional opinions with unquestioning tenacity. The pattern of administrative conduct which occurred permits such administrative censorship to be accomplished through financial exhaustion of proponents of medical treatment embodying new ideas, rather than fair hearing of their merits. Denial of certiorari will leave standing the administrative license, given by the decision of the court below, to exhaust financially through prolonged and repeated administrative proceedings persons who advance progressive scientific ideas—censorship by oppression.

ARGUMENT[1]

I

Petitioner Had a Right to a Fair Determination of the Merits of the Charges of Fraud, Enforcable Through Judicial Review

The charges of fraud against petitioner involved a potential criminal liability (18 USC, Sec. 1341) as well as loss of the right to use the mails, a drastic administrative sanction "that touches basic freedoms possibly having the effect of a prior restraint on communication in violation of the First Amendment or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee." (Justice Douglas in *Stanard* v. *Oleson*, 74 S.Ct. 768, 98 L.Ed. 1151, 1152, 1153 (1954)). Injury has been done to petitioner's personal as well as his business reputation. "In the view of the community the stain is a deep one . . . a badge of infamy." (*Wieman* v. *Updegraff*, 344 U.S. 183, 191, (1952)).

[1] The printed Legislative History, Administrative Procedure Act Senate Document 248, 79th Congress, 2nd Session is herein cited as Legislative History. Emphasis given quoted phrases from the Administrative Procedure Act herein is in all instances supplied.

In the Post Office Department proceeding, petitioner was forced to and did "travel a long expensive road in order to obtain justice .... Some litigants have long purses. Many, however, can hardly afford one law suit let alone two. Shuttling the parties between ... federal (administrative) tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise." (Justice Douglas in *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 227, 228 (1960)).

While arraigned before the Post Office Department petitioner expended many tens of thousands of dollars in his defense. Those expenses were aggravated by harm done his personal and business reputation when the prosecutor secretly made a decision in his own favor branding petitioner guilty of fraud. Reputable publications since then have refused to carry advertising needed in petitioner's mail order business. Thus to the expense of defending himself were added increased business expense and lessened income, as a result of the charges made against petitioner.

Petitioner's adversary had at its disposal the relatively unlimited resources, financial and otherwise, of the federal government, including a relationship with prospective medical witnesses arising out of the expenditure of hundreds of millions of dollars annually in grants for medical purposes.[1]

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[1] The Department of Health, Education and Welfare, through the National Institutes of Health alone, in fiscal year 1961, made grants and awards for medical research to institutions and individuals

(a) Research projects	$273,941,050.00
(b) Construction	5,000,000.00
(c) Training Grants, Research Fellowships, and Traineeships	130,000,000.00

Research projects alone in the past 15 years have involved grants of $1 billion.

Source: Public Health Service Grants and Awards by the National Institutes of Health, Fiscal Year 1961 Funds. U.S.

That petitioner was able to defend himself despite the inherent disadvantages he suffered is a tribute to the courage and character of the eminent physicians who tested his treatment and testified freely on his behalf, risking their personal and professional reputations, without compensation or personal gain, and with no motive other than a professional and scientific interest in revealing the truth as they knew it.

The decision of the court below now leaves the petitioner facing the same charges, brought against him by his government, but in a different name, as if a new proceeding.

Such a result is unconscionable and should be and is unlawful as well.

The Administrative Procedure Act embodies the phylosophy that a citizen is not a mere creature of his government subject to arbitrary treatment, but instead possesses rights before administrative bodies similar to those he possesses in the Federal Courts.

The general requirement of equality of treatment and impartiality is stated in many ways. Thus Section 12 (5 USCA 1011) expressly provides that in general, ". . . all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." Similarly, the requirement is made that those participating in the agency adjudication process do so "in an impartial manner". (Section 7(a), 5 USCA 1006(a). "Presiding officers must conduct themselves . . . with due regard for the rights of all parties" (Legislative History p. 269, House Committee Report), and "in the manner in which people think they should—that is, as judges and not as the representatives of factions or special interests."

Dept. of Health, Education and Welfare, Public Health Service Publication No. 883. Part I, p. v, vi; Part II, pp. i, vi.

(Legislative History, p. 364, House Proceedings). The requirement of impartiality is incompatible with acting "as the representative of an investigative or prosecuting authority . . ." (Legislative History p. 207, Senate Committee Report).

Specific direction to the same effect, in various stages of administrative proceedings, is provided in other sections of the Act, including Section 5(b), (5 USCA 1004(b)) which provides:

> "The agency shall afford *all* interested parties opportunity for . . . hearing *and* decision in conformity with sections 7 and 8."

Sections 7 and 8 (5 USCA 1006, 1007) carry forward the mandate of "hearing *and* decision." The order to be entered must follow "*consideration* of the *whole* record . . . Every party shall have the *right* to present his case or defense . . ." (Section 7(c)). The officer who presided at the reception of the evidence "shall initially *decide* the case," or the agency shall obtain the record "for initial *decision*" (Section 8(a)). The parties are entitled to submit their views as to the final *decision* to be made. "All decisions . . . shall . . . include a statement of . . . findings and conclusions . . . upon *all the material* issues . . . *presented* . . . and . . . the *appropriate* . . . order, sanction, relief or denial thereof" (Section 8(b)).

The dismissal without prejudice the Judicial Officer ultimately justified as an exercise of arbitrary power.

Such an order is not a *decision*. "A *decision* involves reaching a conclusion. Where no conclusion is reached nothing is decided." *Lambros* v. *Young*, 145 F.2d 341 (CADC 1944).

The overall requirement is made in all agency proceedings, that "an interested person" be permitted to appear "for the . . . *determination* of any issue . . . or controversy . . . Every agency shall proceed with reason-

able dispatch to *conclude* any matter presented." (Section 6(a):

This Court in *NLRB* v. *Radio and Television Broadcast Engineers' Union*, 364 US 573, at 579, 5 L.Ed. 2d 302 (1961) ruled that "the words 'hear and determine the dispute' convey not only the idea of hearing but also the idea of deciding a controversy." That statutory phrase was held to require a decision by the NLRB "to determine or settle the dispute", and to preclude the Board, after hearing, from abstaining from deciding the merits of the ultimate controversy. The repetition throughout the Administrative Procedure Act of such similar phrases as "hearing and decision", the "determination of any issue" and that each agency "conclude any matter presented", compel a similar result in this case.

The Administrative Procedure Act was held by the Fourth Circuit in *Deering Milliken Inc.* v. *Johnston* 295 F.2d 856 (1961) to require the NLRB to conclude a proceeding before it, within a reasonable time, by decision on the merits, with judicial review available to an aggrieved party.

So also, the court below in *Minneapolis Gas Co.* v. *Federal Power Commission* 294 F. 2d 212 (1961), held that the Federal Power Commission could not terminate a proceeding which had reached the point of receipt of an Examiner's Initial Decision, without rendering a decision on the issue of the lawfulness of a proposed rate. To do so was held an abuse of discretion, even though there was strong practical justification for such termination.

Here we have a case where the Post Office Department "has walked right up to the line and then refused to cross it—a case, in other words, in which all the evidence necessary to a determination had been received but the determination was not made." *Wisconsin* v. *Federal Power Commission* —— US —— 10 L.Ed. 2d 357 at 369.

(1963). The refusal to cross the line was not due to good faith efforts to administer a public program; but for the unjustifiable and reprehensible purpose of denying petitioner the decision on the merits to which he was entitled, amounting to a refusal to accept a fair result of a judicial proceeding conducted in a manner more than fair to petitioner's adversary.

No escape from the mandatory provisions of the Administrative Procedure Act lies in character of the order as non-decisive, and negative, in the sense that it did not find petitioner guilty of fraud. The judicial review section of that Act renders any such distinction meaningless in point of law.

Although phrased in terms of standards to be used in Court review of administrative action or inaction, the Judicial Review section of the Act (Section 10; 5 USCA 1009) nonetheless imposes those same standards on the agencies at their level of operation. As this Court has recently held in a parallel situation, "the . . . provisions must be given a harmonious reading to the end that the basis on which the . . . action is reviewed is coterminous with the basis on which the (agency) is allowed to act." *Harmon* v. *Brucker*, 355 US 579 at 582; 2 L.Ed. 2d 503 (1958).

Thus the review provisions have the *double* significance of a mandate to administrative bodies as well as to the judiciary in providing (Section 10(e)):

> "SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law . . . It shall . . . hold unlawful and set aside agency *action*, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory . . . authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence . . . In

making such determinations the court shall review the whole record . . ."

The general prohibition of arbitrary and capricious action is, through a series of definitions, far broader in meaning than a simple reading would indicate.

The definition section (Secton 2; 5 USCA 1001) defines the phrase "agency action" as including (Section 2(g)):

". . . The whole or part of every agency . . . . order . . . . sanction, relief, or the equivalent or *denial thereof, or failure to act.*"

This definition is further defined in section 2 as follows:

"(d) . . . 'Order' means the whole or any part of the final disposition (whether affirmative, *negative*, injunctive or declaratory in form) of any agency in any matter . . ."

* * * * *

"(f) . . . "Sanction" includes the whole or part of any agency . . . *withholding of relief* . . . 'Relief' includes the whole or part of any agency (1) grant of . . . remedy; (2) recognition of any claim (or) right . . . or (3) taking of any other action . . . beneficial to any person."

Thus the "agency action" subject to review includes action not taken, inaction, and the denial of relief—in this case, denial of a decision on the merits, based upon a full and fair hearing. The failure to make such a decision infringes also the companion requirement that the agency grant *full relief* to which a person is entitled, rather than stopping "short of statutory right," through failure to acquit, though not convicting.

The legislative history emphasizes these terms of the Act. The Senate and House Committee Reports, in identical language state (Legislative History, 197, 198, 255):

> "The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action or inaction."

The Senate and House Committee Reports, speaking of Section 10(E) regarding the scope of court review, further identically state (Legislative History, 214, 278):

> "'Finding and conclusion' also mean failure to find or conclude as the law and the record may require . . . 'Short of statutory right' means that agencies are not authorized to give partial relief where a party demonstrates his right to the whole. Authorized relief must be granted by an agency to the full extent that entitlement is shown."

To summarize, the Administrative Procedure Act as well as common principles of justice and fair play gave petitioner a right to a fair decision on the merits of the charges of fraud, which is enforceable by judicial review.

II

The Decision Below Purports to Recognize But Effectively Nullifies Petitioner's Right to a Fair Determination of the Charges of Fraud

The right to a fair determination of the merits which the decision purports to recognize is, as a result of that very decision, so ephemeral and meaningless, as to be destroyed by a non-existent and fictitious agreement by petitioner.

It is a complete fiction that petitioner gave advance consent to be bound by whatever conclusion the Judicial Officer might reach in his consideration of the petition to modify the order of dismissal.

No such agreement was pleaded in the District Court notwithstanding Rule 8(c) F.R.C.P., relating to affirmative defenses, for the obvious reason that no such agreement was made. Thus, the record, as well as respondent's brief, contains nothing suggestive of such an agreement having been made.

The District Court complaint alleged the filing of the petition to modify Mr. O'Brien's ex parte dismissal without prejudice of his own complaint, and that thereafter:

> ". . . plaintiff through his attorney, in June 1958, and thereafter initiated and carried on negotiations with the new General Counsel, Honorable Herbert E. Warburton, to agree to a procedure whereby plaintiff would have a full and fair hearing on the merits. Plaintiff's attorney was hopeful that with the change in personnel it would be possible for him to obtain full and fair consideration of the charges of fraud hanging over him. On or about November 6, 1958, a conference was had between Herbert E. Warburton, General Counsel, representing the complainant, and Charles Ablard, Judicial Officer, and plaintiff's attorney. At said conference it was agreed between all participating that plaintiff should be given the full and fair hearing on the merits, up to then denied him. Pursuant to such agreement, an agreed order was entered by the Judicial Officer on or about November 6, 1958, providing that in part that
>
> ". . . the record in the proceeding will be reviewed to determine:
>
> 1. If the decision of March 18, 1958, of the Deputy Postmaster General should be modified to dismiss the proceeding with prejudice for either or both of the following reasons:
>
> a. proof of efficacy of the product.
>
> b. a split of medical authority sufficient to bring the case within the doctrine of *Reilly* v. *Pinkus*.
>
> 2. If the decision of the Deputy Postmaster General should stand unmodified dismissing

> the proceeding without prejudice and permitting the complainant, in his discretion, to file a new complaint."

These are the facts which the court below describes as constituting an agreement by petitioner to abide by the Departmental Decision to follow, without questioning its fairness or propriety.

The agreement plainly did no more than restate petitioner's rights, already possessed, to a fair hearing and determination of the merits, which had been flagrantly and shamelessly denied for years.

The Initial Decision was actually made by petitioner's adversary, the complainant-prosecutor. That same adversary subsequently granted his own motion to dismiss without prejudice to prevent petitioner from obtaining the decision on the merits to which he was entitled. It was those circumstances which made it necessary for petitioner to obtain an agreement that he have a fair hearing on the merits even though already entitled to it by law.

Yet the court below held that the agreement that there be a full and fair hearing, embodied in an order based on petitioner's petition formally filed in the cause, for dismissal with prejudice, amounted to an agreement to be bound by a hearing, *whether fair or not*. By a parity of reasoning, a creditor who accepts a promissory note for a long delinquent debt thereby agrees to accept the note, whether or not paid, in complete satisfaction of the debt.

The Court below seems to justify that result by describing the agreement as "advantageous" to petitioner, because petitioner "stood only to gain and could not lose; there was no understanding that the Judicial Officer might take steps looking toward the issuance of a valid fraud order if the merits so dictated."

The limited scope of the order was the free choice of petitioner's adversary. The petition to modify the dismissal without prejudice (which the court's opinion does not mention), in accordance with customary practice, prayed only for relief to petitioner. No complaint or petition ever asks a court or judicial body to determine the issues either for or *against* the pleader, and to enter judgment for or *against* him accordingly.[1]

Petitioner's adversary could well have opened up the scope of the Judicial Officer's review beyond that agreed upon, had he so desired. In fact, the court below so ruled stating (App. A, p. 30) "the Postmaster General or his delegate (the Judicial Officer) could have decided the case, or the case could have been remanded to another Examiner for a second Initial Decision".

The order of dismissal without prejudice, particularly since fraudulently obtained by the complainant-prosecutor, presented no problem. As the court below only recently had held, the "Postmaster General (and the Judicial Officer as his delegate) ha(d) the inherent power to recon-

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[1] Light is shed on the court's conjuring up the fictitious agreement by its citation in that connection of *United States Bio-Genics Corp.* v. *Christenberry*, 173 F. Supp. 645, 649 (S.D.N.Y.), aff'd 278 F.2d 561 (C.A. 2, 1959). That case involved, in the language of Judge Madden, on appeal, "A formal proceeding interrupted and compromised by what was, in effect, an agreement to entrust the decision . . . to the arbitrament of a one of three named officials." (278 F. 2d 561, 562) The Affidavit of Discontinuance embodying the agreement in that case was further described by the District Court as providing that, "The agency may summarily impose sanctions . . . without regard to certain procedural safeguards to which the person the person would otherwise be entitled and without proof of certain items which would otherwise be required"; and as enabling that person to, "avoid a finding on the charges against him in return for his agreement to follow a future pattern of conduct . . ." (173 F. Supp. at 649) That agreement differed radically from the agreement and order here involved which were regular forward steps in a formal proceeding leading to an official Departmental Decision rather than "arbitrament".

sider and vacate a prior erroneous decision." *National Association of Trailer Homes* v. *Day*, 299 Fed. 2d 37 (1959).

Such power has been held properly exercised within the Post Office Department even though the fraud order was modified after oral argument had been held in this court concerning its validity. *Donaldson* v. *Read Magazine*, 333 U.S. 178 (1947). The Post Office Department was, therefore, completely free to vacate the order of dismissal and to adjudicate the merits of the question of fraud if it so desired. Petitioner had waived on the record in the proceeding the failure of Chief Hearing Examiner Kelly who made the Initial Decision.

The failure to take such action may be attributed to either or both of two reasons.

The record in the proceeding, fairly considered, compelled a determination of the merits in the petitioner's favor. It was for that reason the complainant-prosecutor dismissed the complaint without prejudice. Had a determination on the merits been made in the Post Office Department adversely to petitioner, he would have had then a clear and unquestioned right to judicial review.

Apparently within the department at that time it was believed that a dismissal without prejudice was not subject to judicial review. This is apparent from the Judicial Officer's ruling in this case that he was virtually unrestricted in his power to dismiss without prejudice.

Petitioner was at all times willing to run the risk of an adverse decision in the Post Office Department. This is shown by his waiver of the failure of Chief Hearing Examiner Kelly to make the Initial Decision, and again later by filing the petition to modify the dismissal without prejudice, keeping the case alive. There is no foundation whatsoever for the statement in the decision and the implication to be drawn from it that the order was

limited in scope as an advantage to petitioner. Any such limitation was the choice of an opponent who knew well to whose advantage such a limitation attached, as the subsequent sham decision by the Judicial Officer demonstrates.

The limited scope of the agreed order is therefore attributable to recognition of petitioner's right to prevail, to his adversaries' desire to avoid judicial review, or to both. Such limitation was not, as the opinion implies, for the benefit of petitioner, requiring him to accept without question the sham decision which followed.

III

In Its Other Grounds of Decision the Court Below Failed to Accept the Case Presented to It

The court below held there was no case or controversy between petitioner and members of the Federal Trade Commission; that whether it would bring any charges, and their nature were conjectural; and further that declaratory relief could not be obtained against the Post Office Department defendants since the proceedings there had been terminated.

These points are subsidiary to and consequent upon the decision by the court below that petitioner was not entitled to judicial review of the dismissal without prejudice. They are in no way alternative grounds which independently support the refusal to review that dismissal. Petitioner will herein demonstrate that if the court had upheld review of the dismissal order, the FTC defendants would have been held properly in the case, and that declaratory relief against them as well as the Post Office Department would have been proper, to the extent to which not included in injunctive relief.

To a considerable degree the Court's decision on these points also rests upon its unwillingness to accept the case

before it, as stated in the Complaint as amended and supplemented, and admitted to be true.

The complaint and amendment thereto (JA 28, 29, 72-74) made clear that the FTC charges would involve the *same* question of efficacy of the *same* treatment by petitioner raised by the *same* representations by petitioner concerning the treatment efficacy; and that the FTC charges were inevitable, unless enjoined.

Such statements, even when general and unsupported otherwise, must be accepted as true. *Conley* v. *Gibson* 355 U.S. 41 (1957); *U.S.* v. *Employing Plasterers et al*, 347 U.S. 186 (1953). Here the complaint further set forth subsidiary facts underlying the general statements, not the least of which is the obvious one, that *the whole controversy over whether the dismissal be with or without prejudice was meaningful only if the same charges were to be brought again.*

The complaint made it clear that the FTC was acting at the instigation of the Post Office Department defendants, and in concert with them. Since under Rule 65(d) of the Federal Rules of Civil Procedure an injunction against those defendants would, under the circumstances, be binding upon the FTC defendants because "in active concert or participation with them" the FTC defendants were at least proper if not necessary. The question of their liability "had better be ironed out before enforcement orders issue than upon contempt proceedings . . . courts no less than parties desire to avoid unwitting contempts as well as to punish for deliberate ones" (*Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9 at 17; 1944).

For that reason they were proper party defendants if the case against the Post Office Department were to be upheld. The court below treated the case against the FTC defendants as if independent of the case against the Post Office Department. Were there actually such independ-

ence, plaintiff concedes that the suit against the FTC would be premature.

CONCLUSION

For the reasons advanced petitioner requests that the Writ be granted.

Respectfully submitted,

FRANK J. DELANY
1317 F Street, N.W.
Washington 4, D. C.
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,642

CARL BRANDENFELS, APPELLANT

v.

J. EDWARD DAY, POSTMASTER GENERAL, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided February 14, 1963

Mr. Frank J. Delany for appellant.

Mr. Barry Sidman, Assistant United States Attorney, for appellees. *Mr. David C. Acheson*, United States Attorney, and *Messrs. Nathan J. Paulson* and *Abbott A. Leban*, Assistant United States Attorneys at the time the brief was filed, were on the brief for appellees. *Messrs. Frank Q. Nebeker*, Assistant United States Attorney, and *Harry K. Schwartz*, Assistant United States Attorney at the time the record was filed, also entered appearances for appellees.

Before MR. JUSTICE REED, retired,* and EDGERTON and DANAHER, Circuit Judges.

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* Sitting by designation pursuant to Sec. 294(a), Title 28, U.S. Code.

MR. JUSTICE REED, sitting by designation: In May, 1949, the Post Office Department, as complainant, charged appellant Brandenfels, plaintiff below, with distributing fraudulent advertising through the mails to promote the sale of his hair-growing treatment, in violation of 39 U.S.C. §§ 259, 732.[1] Lengthy hearings were held before a hearing examiner in Washington, D.C., Chicago, and Portland, Oregon. In February, 1954, an Initial Decision adverse to appellant was entered by the Deputy Postmaster General, the hearing examiner who conducted the hearings having resigned. Appellant filed an intra-departmental appeal from the Initial Decision which culminated, in March, 1958, in the dismissal of the proceedings without prejudice. This disposition had been sought by the complainant upon the recognition that procedural errors had precluded the issuance of a valid fraud order. Apparently the defect in the prior proceedings was that the Initial Decision rendered by the Deputy Postmaster General had been prepared by the agency officer who had prosecuted the charges against appellant, in violation of section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c) (Cumm. Supp. 1950).[2] Because of the substantial expense and allegedly harmful publicity which he had already incurred, and feeling that the evidence required a decision in his favor on the merits, appellant objected to the dismissal without prejudice. In November, 1958, appellant and the newly established Judicial Offi-

[1] 1928, 1952 eds. Now 39 U.S.C. § 4005 (1958 ed.)

[2] The Post Office conceded that some such procedural error had been committed and does not deny that section 5(c) of the Act applies to the present mail fraud proceedings. Although it has been held that this section of the Act does not apply to such proceedings, Bersoff v. Donaldson, 84 U.S. App.D.C. 226, 174 F. 2d 494 (1949), the contrary now appears to have been established. Cates v. Haderlein, 342 U.S. 804, 72 S. Ct. 47, 96 L. Ed. 609 (1951), reversing 189 F. 2d 369 (C.A. 7); see Cadillac Pub. Co. v. Summerfield, 97 U.S. App.D.C. 14, 227 F. 2d 29, 30, cert. denied 350 U.S. 901, 76 S. Ct. 179, 100 L. Ed. 791 (1955).

cer of the Post Office Department agreed that the latter would review the record to determine whether the order of dismissal should be modified so as to be with prejudice. Briefs were filed and oral argument heard and, in October, 1959, the Judicial Officer declined to modify the dismissal on the ground that appellant's evidence presented in the original hearings failed to establish that appellant was entitled to a dismissal with prejudice. Thereafter, the Judicial Officer and his successor denied motions to reconsider and to vacate the order denying reconsideration. In these last motions, as in his pleadings in the District Court, appellant charged all postal officials who had been involved in the proceedings with bias and arbitrariness, except the original hearing examiner who allegedly left the Department in protest against the unfair procedures employed in fraud proceedings.

No Post Office proceedings are now pending against appellant, and no fraud order or other sanction has been imposed against him. However, appellant alleges that the Federal Trade Commission now "proposes to . . . institute a proceeding against plaintiff charging him with misrepresenting his treatment by claiming it to be efficacious for the purposes advertised, raising the very same issues as were involved in the Post Office proceeding . . . ."

In December, 1690, appellant filed the present action in the District Court.[3] The amended complaint names officials of the Post Office Department and the Federal Trade Commission as defendants and seeks the following relief: (1) a declaration that the Postal proceedings were conducted improperly; (2) a declaration that appellant's advertising material is not fraudulent; (3) an

[3] Jurisdiction was based on 28 U.S.C. §§ 1331 (federal questions), 1339 (postal matters), 2201-02 (declaratory judgments); 5 U.S.C. §§ 1001 et seq. (Administrative Procedure Act), and the First and Fifth Amendments to the U.S. Constitution.

order enjoining both agencies from proceeding further against appellant in connection with "the same or essentially identical charges"; and (4) "such other and further relief, as is meet and just." The District Court dismissed the complaint on the grounds that it failed to state a claim upon which relief could be granted, and this appeal followed.

The action was properly dismissed as against the members of the Federal Trade Commission, although the dismissal should have been based upon lack of jurisdiction. There is no case or controversy between appellant and the members of the Federal Trade Commission. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 129-31, 59 S. Ct. 754, 83 L. Ed. 1147 (1939); Wolff v. Benson, 103 U. S. App. D. C. 334 258 F. 2d 428 (1958). The FTC has taken no action against appellant and, whatever investigation may now be under way, the nature of any charges which may hereafter be filed is necessarily conjectural. Indeed, charges may never be filed. For the same reasons, it is also true that the Federal Trade Commission has taken no final action which is reviewable under the Administrative Procedure Act. *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864 (C.A. 9, 1953). Moreover, if and when the FTC does file charges against appellant, appellant will be required to exhaust his administrative remedies with that agency before seeking relief in the courts. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938). Even a decision in the postal proceedings in appellant's favor would not necessarily preclude further action by the FTC since the agencies act under different statutes employing different standards and since circumstances may

[*] 39 U.S.C. §§ 259, 732 authorize the Postmaster General to bar the use of the mails only in cases of knowing fraud. Reilly v. Pinkus, 338 U.S. 269, 276, 70 S. Ct. 110, 94 L. Ed. 63 (1949), whereas intent to defraud is unnecessary for the entry of a cease and desist order by the FTC under the Federal Trade Commis-

have changed since the postal proceedings were instituted and terminated. Cf. *Federal Trade Commn.* v. *Raladam Co.*, 316 U. S. 149, 62 S. Ct. 966, 86 L. Ed. 1336 (1942); *Aycock* v. *O'Brien*, 28 F. 2d 817 (C.A. 9, 1928). And whether or not the FTC would be barred is itself a question for the initial determination of that agency. *Securities & Exchange Commn.* v. *Otis & Co.*, 338 U.S. 843, 70 S. Ct. 89, 94 L. Ed. 516 (1949), rev'g 85 App.D.C. 122, 176 F. 2d 34.

The complaint should also have been dismissed against the Post Office on jurisdictional grounds insofar as the appellant was seeking declaratory relief. Despite appellant's expenditure of funds and the alleged harm to his business reputation, he is not entitled to a determination of the abstract questions of whether or not he has been guilty of fraud and whether or not he was proceeded against properly. The Post Office has terminated its proceedings without holding that appellant's practices are fraudulent and without imposing any sanction. Appellant may not enter the District Court merely to vindicate either his feelings or his reputation. *Hearst Radio Inc.* v. *F.C.C.*, 83 N.S. App. D.C. 63, 167 F. 2d 225 (1948); *Metropolitan Edison Co.* v. *F.P.C.*, 169 F. 2d 719, 725 (C.A. 3, 1948); *B. C. Morton International Corp.* v. *F.D.I.C.*, 199 F. Supp. 702 (D. Mass. 1961). *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 82 S. Ct. 337, 7 L. Ed. 2d 317 (1961), modifying *Cargill, Inc.* v. *United States*, 188 F. Supp. 386 (E.D. Mo. 1960); *Helco Products Co.* v. *McNutt*, 78 U.S. App. D.C. 71, 137 F. 2d 681 (1943); *Midwest Coast Transport, Inc.* v. *United States*, 125 F. Supp. 557 (D.S.D., 1954).

Nonetheless, this is not to say that there are no enforceable limitations upon the power of a federal agency

sion Act, §§ 5, 12, 15 (15 U.S.C. §§ 45, 52, 55 (1958 ed.)). Reilly v. Pinkus, 338 U.S. at 277; Mueller v. United States, 262 F. 2d 443 (C.A. 5, 1958).

to conduct lengthy proceedings without ultimately disposing of the issues involved. Section 6 of the Administrative Procedure Act provides that "[e]very agency shall proceed with reasonable dispatch to conclude any matter presented to it . . ." and section 10(e) provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." In *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 863 (C.A. 4, 1961), the Fourth Circuit recognized that these provisions give "rise to legally enforceable rights of the parties to the proceeding" and upheld, with modifications, a district court order prohibiting further hearings before a trial examiner upon a second remand to the examiner by the National Labor Relations Board. The court thus compelled the Board to reach a decision on the basis of the record already compiled by the hearing examiner. In *Minneapolis Gas Co.* v. *F.P.C.*, 111 U.S. App. D.C. 16, 294 F. 2d 212 (1961), a panel of this circuit refused to permit the F.P.C. to terminate rate proceedings prior to reaching a final decision despite the fact that the commission had complete discretion in instituting the proceedings.[5] The court there stated the following:

> "We think the Commission cannot terminate a proceeding after it has actually conducted a hearing to the point of receiving an Examiner's initial decision, without rendering a decision upon the issue presented, which is the lawfulness of the proposed rates. We do not have before us, and therefore do not decide, whether the Commission may terminate a proceeding, once entered upon, at some point prior to the conclusion of the evidentiary hearing. A change of mind, midstream so to speak, may or may not be permissible. But we are of opinion that the

[5] The agencies rely on Hastings Mfg. Co. v. F.T.C., 153 F. 2d 253 (C.A. 6), cert. denied, 328 U.S. 853, 66 S. Ct. 1344, 90 L. Ed. 1626 (1946), for the proposition that an agency has inherent discretion to dismiss proceedings without prejudice. But that case held only that a dismissal without prejudice was not sufficient to invoke res judicata when new proceedings were instituted.

> Commission, having received all the evidence the parties wish to present, and having before it an Examiner's findings, conclusion and decision, cannot at that point change its mind, wiping out the hearing as though it had never occurred, and in effect decide that it will not enter upon a hearing. The provisions of Section 4(e) seem to us to require that, if a hearing is held, all the pertinent evidence presented, and an initial decision rendered, the Commission is required either to let the initial decision stand as its decision or itself to render a decision." 111 U.S. App. D.C. at 19, 294 F. 2d at 215.

Hence, treating appellant's prayer for such relief as is "meet and just" as seeking an order compelling the Post Office to enter a final decision with prejudice, or to set aside its order refusing to do so, we believe that the District Court had jurisdiction to grant such relief in the proper circumstances. The controversy is sharply defined and by his several motions appellant has exhausted all avenues for administrative relief. If after completing lengthy and costly hearings the Post Office had arbitrarily discontinued its proceedings without reaching a decision, appellant would be entitled to relief under sections 6 and 10 of the Administrative Procedure Act.

Nonetheless, several cases subsequent to *Minneapolis Gas*, though recognizing the principle of that case, point out that an agency determination to discontinue proceedings will not be upset where there is good reason therefor. *Eastern Airlines, Inc.* v. *C.A.B.*, 111 U.S. App. D.C. 41, 294 F. 2d 235, cert. denied 368 U.S. 927, 82 S. Ct. 363, 7 L. Ed. 2d 191 (1961); *State of Wisconsin* v. *F.P.C.*, —— U.S. App. D.C. ——, 303 F. 2d 380, 386 (1961), cert. granted 369 U.S. 870, 82 S. Ct. 1138, 8 L. Ed. 2d 275 (1962); *Cities of Lexington, Ky., et al* v. *F.P.C.*, 295 F. 2d 109, 119-22 (C.A. 4, 1961). We hold that in the present case the plaintiff's complaint and its accompanying exhibits disclose such facts that, as to this relief, the complaint was properly dismissed for failure to state a claim upon which relief can be granted.

The complaint reveals that because of procedural defects, notably the improper influence exerted by the prosecutor, a valid fraud order could not have been entered against appellant on the basis of the Initial Decision. Upon discovery of this fact, there were numerous courses which might have been followed. Since no defect was alleged in the record compiled by the original hearing examiner, the Postmaster General or his delegate could have decided the case, or the case could have been remanded to another examiner for a second Initial Decision.[6] If warranted, the charges against appellant might have been dismissed with prejudice. The Post Office chose to dismiss the proceedings without prejudice. After appellant had made known his dissatisfaction with this disposition, an agreement was reached between the appellant and the Judicial Officer of the Post Office Department as to the manner in which the case would thereafter be handled. It was agreed that the Judicial Officer would study the record and either modify the dismissal so as to be with prejudice, or let the dismissal without prejudice stand unmodified.[7] No other alternative was provided.

[6] Administrative Procedure Act §§ 8(a), 5(c), 7(a), 2(a), 5 U.S.C. §§ 1007(a), 1004(c), 1006(a), 1001(a) (Cumm. Supp. 1950).

[7] In June 1958, according to appellant's allegations, he initiated and carried on negotiations

> "to agree to procedure whereby [appellant] would have a full and fair hearing on the merits. [Appellant's] attorney was hopeful that with the change in personnel it would be possible for him to obtain full and fair consideration of the charges of fraud hanging over him. On or about November 6, 1958, a conference was had between . . . General Counsel, representing the complainant, and . . . Judicial Officer, and [appellant's] attorney. At said conference it was agreed between all participating that [appellant] should be given the full and fair hearing on the merits, up to then denied him. Pursuant to such agreement, an agreed order was entered by the Judicial Officer on or about November 6, 1958, providing that [sic] in part that
>
> "' . . . the record in the proceeding will be reviewed to determine:

This was a most advantageous agreement for the appellant since he stood only to gain and could not lose; there was no understanding that the Judicial Officer might take steps looking toward the issuance of a valid fraud order if the merits so dictated. After considering the record, the Judicial Officer concluded that a dismissal with prejudice was not justified and he thus refused to modify the dismissal without prejudice. Since the appellant had previously given his consent to this disposition in the event the Judicial Officer rejected his contentions on the merits, appellant may not complain now that the procedure has been carried out. He is, in effect, bound by his prior agreement. Cf. *United States Bio-Genics Corp.* v. *Christenberry*, 173 F. Supp. 645, 649 (S.D.N.Y.), aff'd, 278 F. 2d 561 (C.A. 2, 1959); *Democrat Printing Co.* v. *F.C.C.*, 91 U.S. App. D.C. 72, 202 F. 2d 298, 305 (1952). Had the appellant not entered that agreement, it is possible that the Post Office would have adopted one of the other alternative procedures open to it. Having pursued a course then acceptable to the appellant, the Post Office cannot now be required to consider the matter still another time.[8]

"'1. If the decision on March 18, 1958, of the Deputy Postmaster General should be modified to dismiss the proceeding with prejudice for either or both of the following reasons:

a. proof of efficacy of the product,

b. a split of medical authority sufficient to bring the case within the doctrine of *Reilly* v. *Pinkus*.

"'2. If the decision of the Deputy Postmaster General should stand unmodified dismissing the proceeding without prejudice and permitting the complainant, in his discretion, to file a new complaint."

[8] Appellant also alleged in his complaint that the Judicial Officer's refusal to modify the dismissal was itself the product of bias, but it is clear from his pleadings that this allegation is based only upon the Judicial Officer's failure to reach a decision acceptable to appellant.

Because of appellant's consent to the procedure followed by the Judicial Officer, we will neither compel the Post Office to proceed further nor enjoin it from ever again instituting proceedings against appellant arising out of related matters.

The dismissal of the complaint is thus affirmed.

APPENDIX B TO PETITION

Title 5, United States Code, Annotated

§ 1001. DEFINITIONS

As used in this chapter.

* * * * * *

Order and adjudication

(d) "Order means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * * * * *

Sanction and relief

(f) "Sanction" includes the whole or part of any agency . . . withholding or relief; . . . "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption or exception; or (3) taking of any other action upon the application of, and beneficial to, any person.

Agency proceeding and action

(g) . . . "Agency action includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . .

* * * * *

§ 1004. ADJUDICATIONS

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

Notice of hearing and issues

(a) Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted. In insatnces in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; . . .

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, . . . and . . . hearing, and decision, . . .

* * * * *

§ 1005. ANCILLARY MATTERS

* * * * *

Appearance and representation of parties

(a) . . . Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. . . .

* * * * *

§ 1006. HEARINGS; PRESIDING OFFICERS; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS FOR DECISION

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section

(a) . . . The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

* * * * *

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. . . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . .

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title . . .

§ 1007. INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided . . . shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision. . . .

(b) . . . All decisions (including initial, recommended, or tnetative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. . . .

* * * * *

§ 1009. JUDICIAL REVIEW OF AGENCY ACTION

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

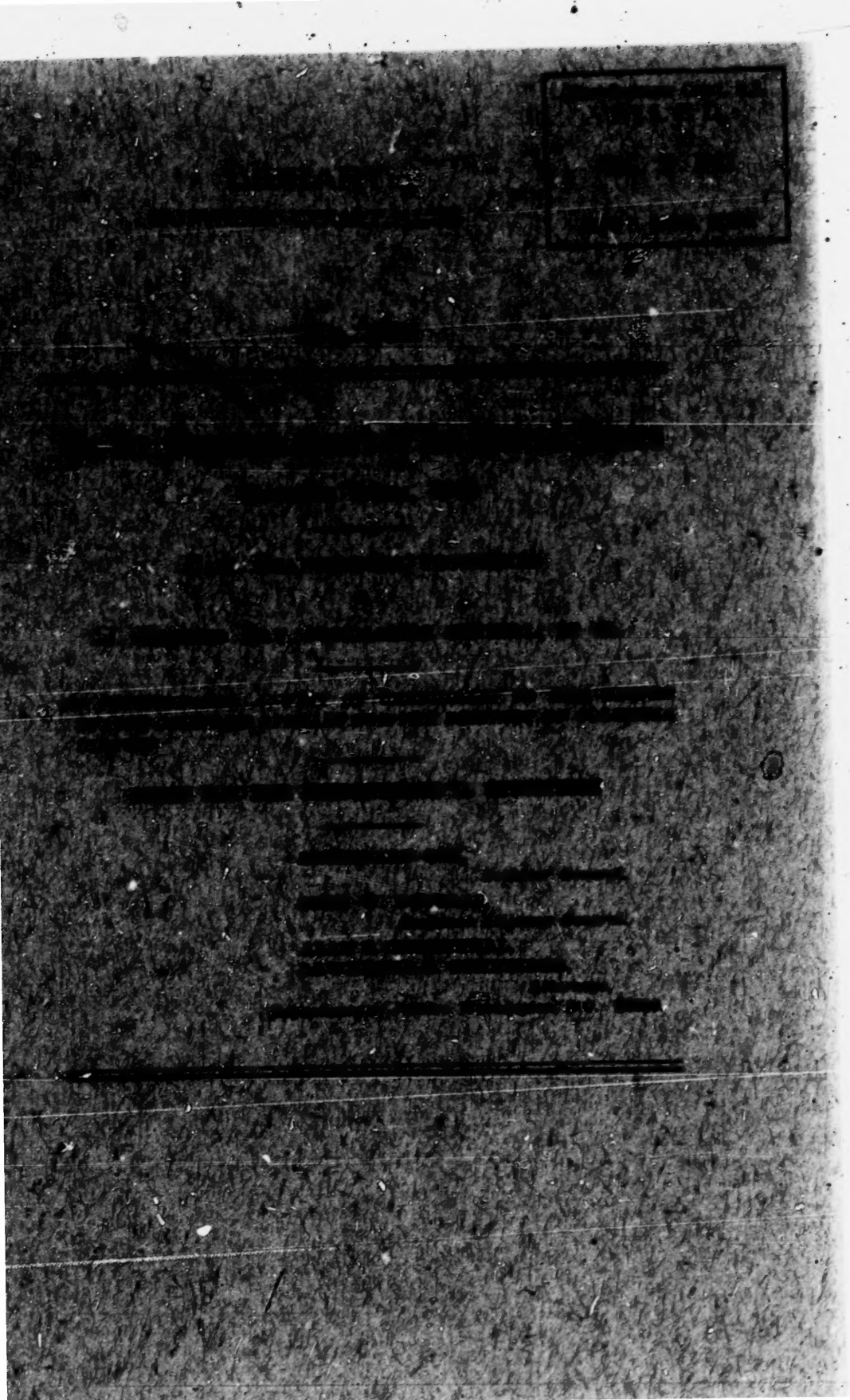
Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

* * * * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, . . .



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 250

CARL BRANDENFELS, PETITIONER

v.

J. EDWARD DAY, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 23-32) is reported at 316 F. 2d 375.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1963. A timely petition for rehearing was denied on April 2, 1963. The petition for a writ of certiorari was filed on July 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, insofar as it sought injunctive relief against the members of the Federal Trade Commis-

sion and declaratory relief against Post Office officials, petitioner's complaint presented a case or controversy within the meaning of Article III, Section 2 of the Constitution.

2. Whether petitioner, having agreed to the procedures followed by the Post Office Department, is now entitled to an order compelling the Post Office to act contrary to that agreement.

STATUTES INVOLVED

1. The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, et seq. provides in relevant part:

> Section 6(a) [5 U.S.C. 1005(a)]. * * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives * * *
>
> * * * * * *
>
> Section 10(e) [5 U.S.C. 1009(e)]. So far as necessary to decision and where presented the reviewing court * * * shall (A) compel agency action unlawfully withheld or unreasonably delayed; * * *
>
> * * * * * *

2. 28 U.S.C. 2201 provides:

> CREATION OF REMEDY
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any

such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

In May 1949, the Post Office Department charged petitioner with distributing fraudulent advertising through the mails to promote the sale of his hair-growing treatment, in violation of 39 U.S.C. (1946 ed.) 259. After lengthy hearings before a hearing examiner, an Initial Decision adverse to petitioner was entered in February 1954 by the Deputy Postmaster General, the hearing examiner having resigned in the interim. Petitioner filed an intra-departmental appeal from the Initial Decision, which culminated, in March 1958, in the dismissal of the proceeding without prejudice. This disposition resulted from a recognition that the Initial Decision had been prepared by the agency officer who had prosecuted the charges against petitioner, in violation of section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c), and that the procedural error precluded the issuance of a valid fraud order.

Petitioner objected to a dismissal without prejudice, on the grounds that the evidence required a decision on the merits in his favor and that the proceeding had subjected him to substantial expense and harmful publicity. In November 1958, however, petitioner and the newly established Judicial Officer of the Post Office Department agreed that the latter would review the record to determine whether the order of dismissal should be modified so as to be with

prejudice. The Judicial Officer, upon review of the record, declined to modify the prior dismissal. Petitioner's motion to reconsider was denied, as was his motion to vacate the order denying reconsideration. No Post Office proceedings are now pending against petitioner, and no fraud order or other sanction has been imposed against him. However, petitioner alleges that the Federal Trade Commission now "proposes to * * * institute a proceeding against plaintiff charging him with misrepresenting his treatment by claiming it to be efficacious for the purposes advertised, raising the very same issues as were involved in the Post Office proceeding * * *" (Pet. 25).

In December 1960, petitioner instituted the present action in the district court, naming officials of the Post Office Department and members of the Federal Trade Commission as defendants and seeking the following relief: (1) a declaration that the postal proceedings were conducted improperly; (2) a declaration that petitioner's advertising was not fraudulent; (3) an order enjoining both agencies from proceeding further against petitioner in connection with the same or essentially identical charges; and (4) such other and further relief as is meet and just.

The district court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The court of appeals, in affirming, held that the complaint, insofar as it sought injunctive relief against the members of the Federal Trade Commission and declaratory relief against Post Office officials, should have been dismissed for lack of

jurisdiction because of the absence of a case or controversy. The court further ruled that, while the district court possessed jurisdiction to compel the Post Office to dismiss the charges against petitioner with prejudice, on the facts of this case such relief would have been inappropriate (Pet. App. 29).

ARGUMENT

The determination of the court of appeals is clearly correct and presents no question of general importance. Further review, therefore, is unwarranted.

1. (a) It is axiomatic that the exercise of judicial power is limited to "cases" and "controversies" within the meaning of Article III, Section 2 of the Constitution. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 130-131; *Muskrat* v. *United States*, 219 U.S. 346, 356-357. In the instant case, the Federal Trade Commission has taken no action against petitioner and the nature of any charges which might emerge from an investigation undertaken by the Commission is necessarily conjectural. Such charges may never be filed at all, and if they are, petitioner will be required to exhaust his remedies before that agency prior to seeking relief in the courts. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499-500; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48.[2]

[2] Petitioner, in contending that the complaint against the Federal Trade Commission should not have been dismissed, argues that its case against the FTC is not independent of its suit against the Post Office, since any charges by the former would be the same as those brought by the latter (Pet. 21). This contention has no merit. Even a decision in the postal proceedings in petitioner's favor would not necessarily preclude

Since there plainly is not, as yet, a case or controversy between petitioner and the members of the Federal Trade Commission, the district court has no jurisdiction to hear and determine this matter.

(b) Similarly petitioner is not entitled to a determination of the abstract question whether he is guilty of fraud, notwithstanding the allegations of financial injury and harm to his business reputation (Pet. 8–9.) The Post Office Department, in terminating its proceedings against petitioner neither held that his practices were fraudulent nor imposed any sanctions against him. Accordingly, as the declaratory jurisdiction of the district court, 28 U.S.C. 2201, 2202, may be invoked only where a complaint is predicated upon an "actual controversy" (*Evers* v. *Dwyer*, 358 U.S. 202, 203; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273; cf. *Poe* v. *Ullman*, 367 U.S. 497, 505–506), such jurisdiction was lacking here.[2]

2. The court below was also correct in holding that, in the unique circumstances of this case, there was no basis for compelling the Post Office to enter a final decision with prejudice or to set aside its order refusing to do so (Pet. App. 29). As the court stressed, petitioner expressly consented to the procedure of which he now complains (Pet. 31).

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further action by the Federal Trade Commission, as these agencies act under different statutes and employ different standards. 39 U.S.C. (Supp. II, 1959–60) 4005; 15 U.S.C. 45, 52, 55; see *Reilly* v. *Pinkus*, 338 U.S. 269, 276–277.

[2] Petitioner's only argument on this point is an assertion that "if the court had upheld review of the dismissal order * * * declaratory relief against * * * the Post Office Department would have been proper * * *" (Pet. 20).

Upon discovering that a procedural defect precluded the issuance of a valid fraud order, the Post Office had several reasonable alternatives open to it. Since there was no defect in the record compiled before the hearing examiner, the Postmaster General or his delegate could himself have decided the case, or the case could have been remanded to another examiner for a second Initial Decision. Instead, the Post Office chose to dismiss the proceeding without prejudice. After expressing his dissatisfaction with this action, petitioner entered into an agreement with the Judicial Officer whereby the latter was to review the case on the merits and either dismiss the proceeding with prejudice or, if he rejected petitioner's contentions, dismiss the proceeding without prejudice to the filing of a new complaint. No other alternative was proposed. The arrangement was highly advantageous to petitioner, who stood to gain a complete exoneration if the Judicial Officer ruled favorably, and could lose nothing if the ruling on the merits were adverse, there being no provision for the issuance by the Judicial Officer of a valid fraud order.

After reviewing the record and hearing petitioner's oral arguments, the Judicial Officer concluded that a dismissal with prejudice was unjustified. Since petitioner consented to this method of disposition and, quite understandably, did not press for the kind of adjudication on the merits which might have resulted in the issuance of a fraud order, he cannot now complain merely because the Judicial Officer decided against him. Cf. *United States Bio-Genics Corp.* v. *Christenberry*, 173 F. Supp. 645, 649 (S.D.N.Y.) af-

firmed, 278 F. 2d 561 (C.A. 2); *Democrat Printing Company* v. *Federal Communications Commission*, 202 F. 2d 298, 305 (C.A.D.C.); *N.L.R.B.* v. *J. L. Hudson Co.*, 135 F. 2d 380, 383–384 (C.A. 6), certiorari denied, 320 U.S. 740; *United States* v. *Vitasafe Corporation*, 212 F. Supp. 397, 398 (S.D.N.Y.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 250

In the Supreme Court of the United States

OCTOBER TERM, 1963

CARL BRANDENFELS, PETITIONER

v.

J. EDWARD DAY, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

RESPONDENT'S BRIEF IS MERELY A RESTATEMENT OF THE OPINION BELOW

Respondent's brief opposing the petition for certiorari has a familiar ring. Its Statement and Argument merely restate excerpts from the opinion below in the order there appearing, and largely in the exact language used, although without benefit of quotation marks.

It naturally follows that respondent ignores the questions presented by the petition for certiorari, the errors of the court below, and the misstatement of the record in the opinion of the court below.

Worse than that, respondent's brief repeats crucial misstatements in the opinion below, and like that opinion, omits material indisputable facts of record.

MATERIAL MISSTATEMENTS AND OMISSIONS OF RESPONDENT

Respondent falsely attributes the order dismissing without prejudice to "recognition that the Initial Decision had been prepared by the agency officer who had prosecuted the charges against petitioner . . .", who thereby committed a "procedural error (which) precluded the issuance of a valid fraud order." (Resp. Br. 3) Far from an attempted correction of such error, the dismissal without prejudice repeated it. "Complainant's real reason for seeking to avoid a decision on the merits was the realization . . . that (petitioner) must prevail." (JA 16) The order dismissing without prejudice, like the Initial Decision, was in substance secretly made by the "agency officer who had prosecuted the charges against petitioner. . ."[1] His repetition of the error was no correction of it.

The real reason, ignored by respondent as well as the court below, is indisputable. "The order of dismissal was entered to avoid giving (petitioner) a full and fair hearing on the merits, and with a recognition by the com-

[1] "On or about March 18, 1958, an order was entered dismissing the complaint against petitioner without prejudice, in accordance with complainant's motion for such dismissal. Said order of dismissal was signed by E. O. Sessions, Deputy Postmaster General acting under authority delegated to him by Defendant Summerfield and in turn redelegated by him by the General Counsel, except as to cases referred back by the General Counsel. This written order was signed by E. O. Sessions under circumstances identical to those under which Mr. Hook had signed the Initial Decision. Said E. O. Sessions, an engineer, like Mr. Hook, had not the capacity to understand or pass upon the questions decided by his order. The order was prepared and secretly supplied to him for execution, without knowledge or approval by petitioner, by the same William O'Brien who had prosecuted the case against petitioner. In executing said order, Sessions made no enquiry into the evidence, the record or the law, but instead relied entirely upon O'Brien for the propriety of the order he executed." (JA 17, 18)

plainant that (petitioner) would prevail if granted such a hearing." (JA 18).

Some seven months before the agreed order was entered, petitioner had filed a petition to modify the dismissal so as to be *with* prejudice, which included as a ground, inter alia, that it was in substance and fact made and entered by petitioner's prosecutor. (JA 19). Respondents ignore that petition, instead treating the review that followed as if due solely to an informal agreement between petitioner and the newly appointed Judicial Officer, by some curious process binding petitioner to accept whatever he thereafter did.

Respondents state only a half-truth.

The agreement was between petitioner and his adversary, the General Counsel, concurred in by the Judicial Officer. It provided for a full and fair determination of the merits of the charges against petitioner, and resulted in the agreed order, entered on the petition pending before the Judicial Officer, for his review of the record. His subsequent review was not, as respondents implies, pursuant to a submission to the Judicial Officer in the nature of informal arbitration, outside the scope of the formal proceedings involved. (Pet. 15-17).

Thus the circumstances surrounding the order were entirely regular, and afford no basis for any consent by petitioners to be bound by the following sham determination of the merits.

Equally misleading is petitioner's reference to the order as "highly advantageous to petitioner, who stood to gain . . . and could lose nothing" because the order was not so broad as to permit a fraud order to issue. (Resp. Br. 7).

The order was advantageous to petitioner only in the sense that like the dismissal without prejudice, and like

a default judgment, it represented recognition by petitioner's adversary that the record required respondent be acquitted of the charges of fraud, fairly determined. It was that adversary, *not* petitioner, who (respondent) asserts) "consented to this method of disposition, and quite understandably did not press for the kind of adjudication on the merits which might have resulted in the issuance of a fraud order . . ." (Resp. Br. 7; Pet. 17-20)

Consent by petitioner could be given only to a waiver of *his* rights. Petitioner's adversary could have reopened the entire case and it was the adversary's consent which resulted in limiting the relief the *adversary* might obtain. All this time, the Post Office Department apparently believed that a dismissal without prejudice, unlike a fraud order, was not subject to judicial review (Pet. 5, 19); were that belief correct, the order would have been pro tanto advantageous to petitioner's adversary.

Respondents perversely argue, as the court below ruled, that the failure of petitioner's adversary to seek a fraud order deprived petitioner of the right to question the sham determination which followed; in brief, that a failure of one party to seek a judgment in his favor, (as by a plea of nolle contendere) licenses the judicial tribunal to deny relief to his adversary.

Not even the Post Office Department took any such view. The Judicial Officer instead finally rested his action on the arbitrary "unrestricted . . . authority to dismiss without prejudice when no final agency decision on the merits has been rendered." (JA 57, Pet. 5)

RESPONDENT'S LEGAL ARGUMENTS ARE ERRONEOUS

Respondent argues that "The Post Office Department, in terminating its procedure against petitioner . . . imposed (no) sanction against him." (Resp. Br. p. 6)

Respondents here come most closely to the real questions in the case by contending that a dismissal without prejudice being no "sanction", petitioner has not been hurt, and therefore cannot be heard.

Respondent overlooks the harm to petitioner through added expense and diminished income from the refusal to decide fairly the issues on which he would have prevailed.

Moreover, such a denial is in law as well as fact a sanction. The term "'Sanction' includes the whole or part of any agency. . .withholding of relief. . ." (Section 2(f) Administrative Procedure Act, 5 USCA 1001 (f)), and such sanction is subject to judicial review. (Pet. 13, 14)

Respondents also state that "a decision in the postal proceedings in petitioner's favor would not necessarily preclude further action by the Federal Trade Commission, as these agencies act under different statutes and employ different standards." (Resp. Br. 5, 6, fn. 2) Respondents overlook the doctrine of collateral estoppel, an aspect of res judicata (Partmar Corp. v. Paramount Theatres, Corp. 349 US 89, 1953). The issue of efficacy of petitioner's treatment, which is the basic controversy, would be the crux of the Federal Trade Commission's complaint, just as it was in the Post Office Department. Petitioner seeks no relief except with respect to such common issue.

CONCLUSION

Respondent has avoided the questions presented by the petition, and thereby has lightened the Court's burden by conceding that on the merits respondents have nothing to say. The effect of respondents' brief is to confess error, should certiorari be granted. (Wiener v. U.S. 357 US 349, 350 fn. 1) Grant of the writ and simultaneous summary reversal is now permissible.

For over ten years petitioner pursued his "administrative remedy" in the Post Office Department in a proceeding that was a travesty of law, justice, and honor. The refusal to decide his case there has been matched by refusal of the Court below to consider the merits of the fraud charges against him, at the very time when his adversaries have been instigating a renewal of the same charges by another arm of the United States.

The court below is uniquely charged with review of administrative action and inaction, but denied that review to petitioner for spurious and frivolous reasons. The decision below allows an administrative body unrestricted authority to dismiss without rendering a decision at any stage of the proceedings, even as a way to avoid deciding a case in favor of private citizens. The administrative process thus has become a sardonic jest, as has the theoretical right of judicial review.

For the reasons stated in the petition, certiorari should be granted.

Respectfully submitted,

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THE PETITIONER WAS DENIED HIS DAY IN THE COURT BELOW

This Court in Letulle vs Scofield, 308 U. S. 415, (1939) granted certiorari because the Court of Appeals had based its decision on a point not presented, argued, or suggested by the litigants. The decision of the Court below was of that very character, with added aggravating circumstances.

The Decision Below

The briefs of the parties in the Court below (lodged with the Clerk of this Court) were the framework within which oral argument was had. No point was argued or suggested beyond those in the briefs.

The parties' briefs demonstrate conclusively that the decision below was on a point not in any way there presented.

Respondent's brief there stated the "Question Presented," in simple terms, saying (p. I):

> "In the opinion of the defendants, appellees here, the sole question presented is: Whether the District Court had jurisdiction of the subject matter of appellant's complaint."

Respondent's brief addressed itself only to that question, contending that there was no case or controversy, and that petitioner had failed to exhaust his administrative remedies (Resp. br. below, pp. 10-24).

Petitioner's briefs in the Court below likewise made no mention of the point on which that Court decided the case.

Respondent's brief went so far as to confess error having been committed against petitioner by the District Court. Conceding that the dismissal of the complaint was erroneous because "with prejudice" respondents asked (Resp. br., pp. 24, et. seq.), that the dismissal "order . . . be modified on appeal . . . so as to reflect a jurisdictional dismissal of the complaint; and, as modified, the order . . . be affirmed." Respondent's brief submitted the full text of a proposed order which would carry out this request (pp. 26, 27).

Despite agreement on this point by the parties, the Court below affirmed the dismissal with prejudice.

The grounds for its decision—an agreement to abide by and to accept the Judicial Officer's determination; (waivering any right to judicial review)—were completely improvised by the Court below. They were false in fact, and specious in law, with the opinion significantly omitting to state facts admitted of record, which, if stated, would have revealed the falsity of those upon which the opinion relied.

The petition for certiorari herein so demonstrates. Respondent's opposition only parrots the opinion without benefit of quotation marks and makes no attempt to uphold it as either truthful, rational, or in accord with the record and accepted principles of law. (Resp. Opp. and Reply.)

Thus the Court below assumed the role of an adversary to petitioner, and in that role went factually and legally far beyond the position taken by petitioner's genuine adversaries.

The Court violated its own which rules, require parties to preface their briefs with a statement of the questions presented (Rule 17(b)(1)); (c)(1)), and which generally confine the issues to be considered to points "presented according to the rules . . . ." (Rule 17(g)) Compare Flournoy vs. Wiener, 321 US 253 (1943) where this Court refused to consider a question which appellant had not included in his statement of points.

The injudicious and unjudicial conduct of the Court below thus deprived petitioner of a hearing on the point actually decided. The principle violated was given classic statement in Morgan vs. United States, 304 U.S. 1 (1937) where, in expounding the fundamental requirements of a full and fair hearing, this Court held and said (p. 18, 19):

> "The right to a hearing embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the Government . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

The District Court had acted upon a motion to dismiss the complaint for want of jurisdiction over the subject matter, which conceded the truth of the complaint. Re-

spondents as defendants in that Court raised no question of waiver of right of review by any agreement such as the Court of Appeals found, for the very good reason that no such agreement was alleged. Such a defense could have been raised only affirmatively, in answer, in accordance with the requirements of Rule 8(c) FRCP, relating to "estoppel . . . release . . . waiver, and any other matter constituting avoidance or affirmative defense."

Had such a defense been raised in the District Court, petitioner could have taken issue on the facts, and (presumably) have been heard on the law; moreover, petitioner had the right granted by Rule 15, FRCP, of amendment to the complaint, "freely given when justice so requires," exercisable by petitioner when necessary or appropriate in the light of contentions made.

The erroneous and irrational basis of the decision below could have been clearly demonstrated through the Court below had petitioner known that any such question was in the case.

The Aggravated Character of the Denial of Petitioner's Day in the Court Below

For over ten years petitioner has been seeking a fair administrative or judicial determination of the charges of fraud made against him.

The Judicial Officer's decision was attacked in the complaint filed in the District Court because made on grounds not presented to him in any way by the parties (JA 21), and because of a false finding by him that petitioner had waived his expert scientific evidence (Pet for Cert, p. 5, fn. 1). Instead of *correcting* these errors the Court below *repeated* them with its own failure to give petitioner a hearing on the points actually decided, and with its own false finding of a waiver by petitioner of his right to a judicial review.

It was the denial of the Court below of a fair hearing to petitioner which means that to date petitioner has had no due process of law as required by the Fifth Amendment to the Constitution. (Consolidated Edison Co. v. NLRB, 305 US 197 (1938)).

The opinion of the Court below pays lip service to petitioner's right to judicial review, while effectively denying that right through the denial to petitioner of a fair hearing, on grounds, "without any fair or substantial support." Such artificial reasons cannot defeat the jurisdiction of this Court. (Wolfe v. North Carolina, 364 US 177 (1960)).

THE MEDICAL IMPORTANCE OF THE ISSUES

More than male vanity is involved in petitioner's treatment for hair loss. There has been a striking increase in baldness of the fair sex. In recent years, "the average estimated increase . . . in the practices of dermatologists who noted the increase was 122% . . . [M]ost of the patients . . . complain bitterly about becoming 'bald' and many become despairing and psychically deeply disturbed." [Sulzberger and Kopf, Diffuse Alopecia in Women, its Unexplained Apparent Increase in Incidence, 81 Archives of Dermatology, 566 (1960)].

As in the case of the opposite extreme of excessive hair, the afflicted woman becomes "to the layman an object of amusement, to the physician a riddle in diagnosis, to herself an object of ridicule, social rejection, and abject misery, which, at times, has resulted in suicide." [Bissell, Hirsutism, 53 Annals of the New York Academy of Sciences 742 (1951)].

Thus, outrageous denial of petitioner's rights to fair consideration is accompanied by indifference to and disregard of public interest in the benefits of his treatment.

which may be lost through lack of financial resources to defend repeated oppressive proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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